Case No: HT-2022-000409

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
[2024] EWHC 1190 (TCC)

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Thursday, 21 March 2024

BEFORE:

MRS JUSTICE JEFFORD

BETWEEN:

WILLMOTT DIXON CONSTRUCTION LIMITED

Claimant

- and –

1. **PRATER & ORS**
2. **LINDNER EXTERIORS HOLDING LIMITED**
3. **SHEPPARD ROBSON LIMITED**
4. **AECOM INFRASTRUCTURE AND ENVIRONMENT UK LIMITED (formerly URS SCOTT WILSON LIMITED).**
5. **AIS SURVEYORS LIMITED (formerly APPROVED INSPECTOR SERVICES LIMITED)**

Defendants

-and-

LINDNER PRATER LIMITED

Third Party

-and-

LINDNER BUILDING ENVELOPE GmbH

Fourth Party

-and-

LINDNER FASSADEN GmbH

Fifth Party

-and-

LINDNER GROUP KG

Sixth Party

Sean Brannigan KC (instructed by **Beale & Company Solicitors LLP**) for the **Fourth Defendant**.
Paul Cowan (instructed by **Kennedy's Law**) for the **Third Party**.
Nicola Timmins (instructed by **Wedlake Bell LLP**) for the **Fourth**, **Fifth** and **SixthParties**.

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. MRS JUSTICE JEFFORD: This is an application of the fourth to sixth parties, Lindner Building Envelope GmbH, Lindner Fassaden GmbH and Lindner Group KG ("the German parties") for a stay of the additional claim made against them by the fourth defendant, Aecom.

2. The claim made in the additional claim is also made against the third party, Lindner Prater Ltd ("LPL"), which is an English company. LPL has not made a similar application for a stay, but the German parties' application extends to LPL, and LPL now supports the application. As I read the correspondence to which I was referred a short time ago, LPL did seem to consider that the additional claim could be dealt with, and indeed would be dealt with, together with the main claim but I do not propose to determine this application on the basis that there was any kind of agreement to that effect. Mr Brannigan has accepted that it is open to LPL to change its position.

3. The application has been heard as a matter of urgency because it was made on or about 14 March 2024, and the Defences of the third to sixth party to the additional claim were, by agreement of an extension of time, due on 20 March. An extension of time has been given for the defences until after the hearing of this application, although yesterday and in time LPL served its Defence in any event.

Background

4. The background to this application and these proceedings is as follows. The main claim concerns a project for the design and construction of a mixed-use commercial and residential development in Woolwich, which incorporates a Tesco Extra store together with a number of residential units. The claimant was the design and build contractor for the development. Prater, defendant 1, was a specialist design and build envelope subcontractor, and defendant 2, Lindner Exteriors Holding Ltd, guaranteed Prater's services. It is, putting it neutrally, not, I think, in issue that both defendant 1 and defendant 2, which I shall refer to as Prater and Lindner, are part of the same corporate group as the third to sixth parties. The fourth defendant, Aecom, was the building services engineer but also provided fire engineering services including the preparation of fire strategy reports. The third and fifth defendants were also involved in the provision of services on the project.

5. The claimant, Willmott Dixon, claims over £46 million from the defendants on various bases, the claims being said to arise out of the use of materials for the external wall construction of the development, which are alleged to have been unsuitable or defective from a fire safety perspective. Each of the defendants to the main claim denies liability to the claimant, and there are contribution claims amongst the defendants, including a claim for contribution by Aecom against Prater and Lindner.

The statutory regime

6. The additional claim is made against LPL and the German parties for a Building Liability Order under section 130 of the Building Safety Act 2022. I had understood that to be a claim that would be made in the event that Prater and Lindner were liable in contribution to Aecom. Mr Brannigan says that, as pleaded, the claim is also made in respect of the liability to Willmott Dixon. It is not necessary for me to consider today whether such an application is either open to Aecom or likely to succeed, and I am more concerned with the claim and the arguments that relate to the claim that would arise in the event that Prater and Lindner were found liable by way of contribution to make payment to Aecom.

7. A Building Liability Order may be sought under section 130 of the Building Safety Act, in the circumstances set out in this section. I observe that it is a relatively new piece of legislation and the Building Liability Order is a relatively new creation on which there is little if any authority.

8. In any event, section 130 provides as follows:

> "(1) The High Court may make a building liability order if it considers it just and equitable to do so.
>
> (2) A 'building liability order' is an order providing that any relevant liability (or any relevant liability... of a body corporate ('the original body') relating to a specified building is also—
>
> (a) a liability of a specified body corporate, or
>
> (b) a joint and several liability of two or more specified bodies corporate."

9. Subsection (3) defines the meaning of "relevant liability" for the purposes of this section as:

> "a liability (whether arising before or after commencement) that is incurred—
>
> (a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or
>
> (b) as a result of a building safety risk."

10. In subsection (6) a building safety risk is defined as "a risk to the safety of people in or about the building arising from the spread of fire or structural failure".

11. A specified body corporate as referred to in subsection (2) is also the subject of further definition in subsection (4), which provides that:

> "A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body."

12. A subsequent section, that is, section 131 of the Act, defines the meaning of the term "associate" or "associated", which it is not necessary for me to set out on this application, but provides the basis on which the Building Liability Order is sought in the additional claim against the third to sixth parties. In other words, Aecom's case is that LPL and the German parties are all such associated companies.

Aecom's position

13. In short, it is Aecom's position that Prater and Lindner have divested themselves of assets, as set out in Mr Brannigan's skeleton argument starting at paragraph 12. He says that on or about 15 April 2021, after the claim against Prater had been intimated, Prater disposed of its business and assets to the third party, LPL, for a little over £6 million, which left Prater as a shell company that is not actively trading. The published accounts covering the period up to December 2021 showed Prater to have net assets of approximately only £2.25 million, having paid a dividend in that accounting year of £17,989,000, and Lindner was reported as having net assets of approximately £22.4 million. However, on 7 March 2022 Lindner divested itself of its subsidiaries, Lindner

Interiors Ltd and LPL. LPL was transferred to the fourth party, Lindner Building Envelope GmbH, and Prater was transferred to a company not so far involved in this litigation. On 16 March 2022 Lindner acquired the shares of Prater for £3.29 million and on 12 April 2002 Lindner disposed of its interest in the company to which the Prater assets had been transferred for a sum of just over £2 million. Mr Brannigan submits that the publicly available accounts show that the financial positions of both Prater and Lindner deteriorated thereafter such that Prater has considerable net liabilities and Lindner has no significant assets, with the result that neither of them will be likely to satisfy any judgments against them.

14. That is the background to and the reason for the making of the additional claim for Building Liability Order against the German parties and LPL, whom Aecom plainly consider to be more financially viable.

The positions of LPL and the German parties

15. LPL's case is now set out in its Defence. There is no evidence from the German parties to contradict the facts as set out in Mr Brannigan's skeleton on this application. Ms Timmons says that that is because the purpose of this application is to seek to save rather than expend costs, and it would not have been appropriate to go into any further detail or provide any further evidence, because that would have been to a large extent tantamount to setting out some or part of the applicants' defence. She does not accept that the true position is that either Prater or Lindner would be unable to pay a judgment against them. Quite simply, she submits, these are matters to be determined in the future and at this stage the matters relied on by Aecom simply explain why the additional claim has been brought and no more than that.

16. In summary, Ms Timmons' submission on behalf of the German parties is that the additional claim should be stayed such that no further steps are taken until after judgment has been delivered in respect of the main claim. Her submission is that the application for a Building Liability Order is wholly contingent on the court finding (a) liability on the part of Prater and Lindner and, indeed, Aecom, and (b) a liability of Prater and Lindner to make contribution to Aecom because they are all liable in respect of the same damage. It follows, she submits, that the circumstances in which a

Building Liability Order might be made may never, in fact, arise. Further she submits that if Prater and/or Lindner were to pay the amount of any relevant judgment against them, the need for a Building Liability Order in favour of Aecom would not arise. In those circumstances, she submits, better case management, consistent with the overriding objective, would be achieved by treating the additional claim as a matter to be heard separately, if indeed it ever needs to be heard, following judgment on the main claim.

Discussion

17. As a matter of principle, it seems to me that the legislation does not require a party against whom a Building Liability Order is sought to be made a party to what I would call the main claim or to participate in those proceedings. That is because, for example, the company against whom the order is sought may be one that does not even exist at the time of the proceedings, or because the circumstances in which the order is sought are not even in contemplation at the time of those proceedings. However, if the making of an application for a Building Liability Order is contemplated, it will generally be sensible and efficient for the company against whom that order is going to be sought to be made a party to the litigation and for that application to be heard together with the main claim, although, as I indicated during the course of this hearing, that does not and would not in any way bind a judge to determine that application as part of the main claim and leave it open to the judge as a matter of case management to direct a further hearing in that respect.

18. There are a number of reasons why it would generally be sensible and efficient for matters to progress with the main claim and additional claim being heard together. Firstly, it seems to me that the legislation assumes that the associated company will not be able to challenge a finding or even an agreement establishing liability of the original entity. But that does not mean that it may not be open to the associated company to argue that the circumstances in which that liability was established mean that it is not just and equitable to make a Building Liability Order. Such arguments are avoided if the associated company is party to the proceedings.

19. The applicants in this case meet that point by offering to agree in any order made that "the fourth defendant and the fourth, fifth and sixth parties are to be bound by the final judgment in the main claim as regards the liability of the first defendant and the second defendant insofar as that liability is relevant to the alleged liability of the fourth, fifth and sixth parties in respect of the additional claim". In other words, they agree to be bound by the findings of liability in the main claim and I infer that LPL would also agree so to be bound if this applications were granted.

20. That is, however, only part of the matter because the liability also has to be a relevant liability as defined in the Act. Ms Timmons and Mr Cowan, on behalf of LPL, say that this is an issue which would best be determined after judgment and when, so to speak, all the findings are in. Ms Timmons submitted that there is, in any event, simply a legal argument as to whether there is a relevant liability, although Mr Cowan's position seemed to me to be somewhat different. Ms Timmons also emphasised that her clients would be bound not only by findings on liability, as set out in the proposed draft order, but also as to responsibility or culpability. She said that that position would extend to the position where Prater or Lindner had a “technical defence”. As I understood it that position extended to circumstances in which, for example, Prater or Lindner’s liability to the claimant might be limited by a contractual term but the court expressed views about these parties responsibility for damage which would be relevant to the contribution sought by Aecom in respect of the same damage.

21. The obvious difficulty with that position is that it assumes that the judge will make the relevant findings such that the answer to the question of whether there is a "relevant liability" is simply a matter of law or a matter that follows inexorably from the judgment which has already been given. That does not follow, particularly where the issues as to what is a relevant liability are not, almost by definition, part of the main claim. Nor does it follow that the judgment will make what the associated company may contend are the material findings as to the extent of responsibility or culpability in so far as those are relevant to the issue of whether it is just and equitable to make the Building Liability Order.

22. Mr Brannigan submits that if the additional claim is hived off, then whether the liability is a relevant liability will not be an issue in the main claim. It may or may not be the

case that the judgment will address and will turn on the issues that the defendants say or may say arise, and it follows that it may or may not be the case that the sorts of findings to which Ms Timmons referred are made. As Mr Brannigan points out, if the relevant issues have not been determined, the court will either have to make further determinations on the basis of the evidence already covered or hear further evidence. It will be doing so inevitably some considerable time after the main hearing, and that is, in my view, patently not satisfactory.

23. Mr Cowan submits further that Mr Brannigan's concern is overstated because in this case whether or not there is any building safety risk will, in effect, be determined in the main claim because the claim against Prater is put in part on the basis of breach of a contractual obligation to comply with the Building Regulations. Prater says in its defence that those are only a matter for the court if there is a risk to health and safety and there is not. So, it is submitted, the issues relevant to whether there is a building safety risk will inevitably be addressed in the judgment.

24. I am not persuaded by that argument. There are other bases of the claim against Prater and contractual obligations that do not require that issue to be resolved. It is entirely possible that the judge might decide the case against Prater on the breach of such obligations and not consider it necessary to determine the particular issue relating to the Building Regulations and whether or not there is a risk to health and safety. Judgments do not have to provide an answer to every issue that might appear to be raised on the pleadings. That possibility, that is, that those findings are not made, is all the greater if the issue of whether there is a relevant liability is not before the court.

25. As Mr Brannigan submits, the same points arise in respect of what is just and equitable, and I agree. I simply do not see the sense in Ms Timmons' position that she would be content to abide by whatever may or may not be decided in the main claim if there is a stay, because there will be a judgment and she will then in any future hearing know what decisions have been made and what they now need to address, but would not be content with that position if there was no stay. In other words, if there is no stay, she says that her clients will then feel the need to participate fully in the trial but, if there is a stay, they would not feel the same need. The reality is that if there is no stay and the applicants are content to be bound by any findings that are made, there is no particular

need for them to participate fully in the trial of the main claim. However, if they wish to make submissions or cross-examine or whatever it may be in relation to issues that may arise as to whether there is a relevant liability or whether it is just and equitable to make a Building Liability Order, it is far more sensible and efficient that they do so in the context of the main claim and not in a subsequent and separate hearing dealing with a series of discrete points that are now said to arise that have not perhaps appeared to arise in the main claim and be the subject matter of the judgment.

26. All those matters militate against the granting of the stay, and I note, although it is not the basis of my decision and it is not a question of the number of votes in the proceedings, that the claimant and the other defendants support Aecom's position and also oppose the stay. Having said all of that, the applicants argue that it would impose an undue burden on them to participate in the trial of the main claim. The answer to that point is that it is often the case in respect of contingent claims. But it is also often the case that the party against whom a contingent claim is made needs or wants actively to participate in the main proceedings, that is, calling its own expert evidence and so forth. It may consider that the principal defendant it is not properly advancing the defence; it may wish to make different points; it may have different contractual matters that it needs to raise. That is not seem to be or certainly does not need to be the case here, and it seems to me that the objection to the costs of participation in the trial of the main claim can be met both by proper case management and any costs order that may be made in the future. As I have said, the applicants are willing to be bound by findings on liability and, indeed, it appears from the submissions made to me, by any other findings of fact including findings as to responsibility and culpability. The result of that is that any evidence that these parties adduce or cross-examination theyundertake can be anticipated to be limited to the issues that they say arise in respect of the Building Liability Order or which may arise in that respect.

27. I simply do not see, as I have already said, how not staying the additional claim and having the participation of the third to sixth parties in the main claim will somehow require them to take a more active part than they would have done if simply accepting that they will be bound by any findings made. Further, if they do take such an active part or an active part to the limited extent appropriate, that will also enable the court to know what the issues are in relation to the application for a Building Liability Order

and to make the appropriate findings and to do so in one go. The fact that there may be a variety of possible outcomes does not change that. It is often the case that a party's position is advanced on the basis of different possible outcomes of the judgment, and, as I have observed in the course of argument, if the judge in due course considers that there is a scenario that has not been addressed, it is always open to him or her to direct a further hearing to deal with it.

28. In those circumstances and with that anticipation, counsel does not need for example to sit through an entire trial. A transcript will be available and can be reviewed. Indeed, that is what Ms Timmons anticipates would happen if the additional claim was stayed and before any further hearing on the Building Liabiliyt Order took place. If there are issues in respect of which the German parties need to be involved, it is more efficient to have them involved at trial and not have the issues raised at a hearing later. If they do not need that level of involvement, the trial can be managed accordingly.

Conclusions

29. For all those reasons, I would decline to grant the stay that is sought. I also bear in mind that the practical position is that Aecom has at this stage set out its position as to why this order will be sought against these parties. It was submitted to me that Aecom has no entitlement to know what is said in response and what the issues are that may be raised in response and can simply wait until after the trial. That does not seem to me to be a practical proposition for all the reasons I have already given.

30. I therefore refuse the application.

31. The additional claim will proceed with the intention that it should be heard at the same time as the main claim. I note that Aecom's solicitors have already made proposals for a procedural timetable to accommodate that. It seems to me there will need to be a case management conference in that respect unless a substantial measure of agreement breaks out because it will be necessary to address some of the issues that I have already indicated may need to be addressed - that is as to the scope of disclosure and witness evidence that may need to be given,. Probably any issues as to precise participation in the trial can await the pre-trial review. But a case management conference, unless, as I

say, some measure of agreement breaks out, will I think I think be necessary, and there needs to be a date for defences of the fourth to sixth parties, the third party's having already been served. In fairness that needs to take account of the fact that this application was made and has only now been determined. It will I think have been a little unreasonable to have been expecting those parties to be preparing their Defences in anticipation that they would not succeed on this application, so a sensible period of time needs now to be provided to them to respond.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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(This judgment has been approved by the judge)